

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN COULTER,

Defendant-Appellant.

UNPUBLISHED

June 2, 2005

No. 254343

Genesee Circuit Court

LC No. 03-011936-FH

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

The jury convicted defendant for scalding his five-year-old stepdaughter in a bathtub containing hot water. At trial, the victim and other witnesses testified that defendant “whooped” the victim, put her in the scalding hot bathtub, and held her there. The victim’s burn doctor testified that her injuries were inconsistent with defendant’s claim that he found the victim face down in the bathtub. The victim was hospitalized for 2½ months, and required extensive physical therapy and regular counseling sessions. Defendant appeals his conviction of first-degree child abuse, MCL 750.136b(2), and his sentence of 8 to 15 years’ imprisonment. We affirm.

A. Ineffective Assistance of Counsel

Defendant raises several claims of ineffective assistance of counsel. To establish this claim, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced him that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Regarding the showing of prejudice, “[a] defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant says that his defense counsel was ineffective because he failed to move to suppress testimony regarding two of defendant’s interviews, one conducted by the police, the other conducted by a Family Independence Agency caseworker.

Were we to conclude that defense counsel’s failure to move to suppress these interviews “fell below an objective standard of reasonableness,” defendant has not made the required

showing that he was prejudiced. *Pickins*, *supra* at 338. The prosecutor presented overwhelming evidence from which a jury could convict defendant quite apart from the testimony premised on the two interviews. Thus, defendant simply failed to demonstrate a reasonable probability that, but for his counsel's error, he would not have been convicted. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant also maintains that his counsel was ineffective because he failed to object to the detective's testimony regarding the detective's questioning of defendant about statements made by defendant's wife, who did not testify at trial. Defendant argues that these statements constituted prejudicial, inadmissible hearsay, because they contradicted his version of events, and violated his right of confrontation under *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1374; 158 L Ed 2d 777 (2004).¹ Defendant argues that, for "testimonial" hearsay evidence to be admissible against a defendant, the declarant must be unavailable and the defendant must have had "a prior opportunity for cross-examination" of the declarant.

Were we to hold that this testimony violated *Crawford*, we nonetheless hold that this testimony is harmless beyond a reasonable doubt. The extensive injuries sustained by the victim strongly support the prosecution's case. The jury had to resolve whether defendant forced the five year old victim in a bath tub full of scalding water or whether the victim voluntarily climbed into the tub on her own and remained there long enough for her skin to peel off of her body, while defendant slept. The evidence at trial established that human reflexes would prompt an individual to get out of scalding water. When police arrived at the crime scene, they found that the victim's hair and pants were dry. However, defendant told the police that when he awoke from a nap he found the child face down inside the bathtub having a seizure. When the paramedics picked up the victim she began to scream "dada whooped me," or "David whooped me." At trial, the victim testified that Defendant "put me in the tub and he whooped me." She also testified that defendant taped her hands together, which was substantiated by the physical evidence. This evidence overwhelmingly established defendant's guilt, independent of the testimony defendant claims his counsel should have moved to exclude.²

¹ Because *Crawford* was decided after defendant was convicted, he concedes that *Crawford* does not directly support his claim of ineffective assistance of counsel. Defense counsel cannot be ineffective for failing to rely on case law that does not exist at the time of his trial. However, defendant cites to *Ohio v Roberts*, 448 US 56; 100 S Ct 2521; 65 L Ed 2d 597 (1980), the case overruled by *Crawford*, and claims that the testimony from the detective was inadmissible and violative of his confrontation clause rights under both *Roberts* and *Crawford* and his counsel was ineffective for failing to recognize this fact. For the reasons set forth in this opinion, we find no legal merit to defendant's argument.

² Moreover, the contested statements were not hearsay because they were not offered for the truth of the matter asserted. See MRE 801(c). The record shows that the detective used the statements to show *why* he confronted defendant, not to prove the matters asserted. Therefore, any hearsay objection by defense counsel would have been futile, and defense counsel's failure to object to this testimony does not constitute ineffective assistance of counsel. See *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant also claims that defense counsel prejudiced his trial by failing to impeach the detective with his videotaped interview of defendant. Only a small portion of the video was played at trial, and defendant's arguments contain references to portions that were not shown to the jury. It is well-settled that a party may not expand the record on appeal and, because the record is devoid of evidence that supports defendant's argument, the record is insufficient to verify defendant's allegations. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Further, defendant fails to demonstrate how his defense would have benefited from evidence regarding whether he saw skin peel off of the victim's body, and he fails to explain how the videotape would have impeached the detective's credibility. Accordingly, defendant has not shown that defense counsel's use of the videotape would have produced a different result and his ineffective assistance claim must fail.

B. Judicial Misconduct Claim

Defendant avers that he was denied a fair trial because the trial judge told the jury a story during a break in the trial proceedings that, by analogy, impaired defendant's credibility and suggested that defense counsel was manipulative. We review claims of judicial misconduct to determine whether the trial judge's statements evidenced partiality that could have prejudiced the jury against the defendant. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). This Court reviews the record as a whole, and may not take portions of the record out of context. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Because this issue is unpreserved, it is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant acknowledges that the trial court often told the jury historical and humorous legal anecdotes during breaks and he further acknowledges that the trial court did not express any feelings of ill will toward defense counsel. From our reading of the whole record, the anecdote about which defendant complains was not intended to express, and did not express, any antagonism or derision toward defendant or his counsel. Moreover, the trial judge specifically instructed the jury that his "stories" should not be considered as evidence in the trial, and jurors are presumed to follow instructions given by the trial court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant's claim must fail because he has not shown that the trial court's action was error or that, if an error occurred, he has not shown that he is actually innocent or that the alleged error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, *supra* at 763.

C. Alleged Prosecutorial Misconduct

Defendant asserts that the prosecutor denigrated defense counsel during his closing argument by insinuating that defense counsel tried to place the blame on other parties, and tried to change the facts of the case. Because the present claims of prosecutorial misconduct are unpreserved, we review this issue for plain error. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Prosecutorial misconduct is decided case by case, and this Court must consider the relevant part of the record and examine the prosecutor's remarks in context. *Id.* at 272-273. Prosecutors are "'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659,

quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). A prosecutor may not question a defense counsel's veracity, or suggest that defense counsel intentionally sought to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984).

The prosecutor's comment that defense counsel made up facts was improper. However, it had little effect in the context of the parties' closing arguments and rebuttal. We reverse for improper remarks from the prosecutor only if a curative instruction could not have eliminated the prejudicial effect of the improper remarks. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). The trial court instructed the jury that statements made by attorneys are not evidence, and jurors are presumed to follow their instructions. *Graves, supra*, at 486. Thus, defendant has not demonstrated plain error affecting his substantial rights.

Our review of the record indicates that the prosecutor's other comments are within the scope of the wide latitude that prosecutors are given regarding their arguments and conduct. *Bahoda, supra* at 282. The record shows that the prosecutor's statements were made in the context of his arguments regarding defendant's conflicting versions of the event, and were intended to discredit the defense theory.³

D. Sentence

Defendant also argues that the trial court improperly imposed a minimum sentence that is 21 months above the upper end of the guidelines range. We disagree.

The trial court based its departure on three reasons: the physical injuries to the victim, the psychological injuries to the victim, and defendant's long history of failing to appear in court. A court sentencing a defendant under the legislative sentencing guidelines may depart from the appropriate sentence range if it has a substantial and compelling reason for the departure, and states the reason on the record. MCL 769.34(2)-(3). Reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003).

Defendant argues that the trial court erred in its upward departure based upon the victim's physical and psychological injuries because two offense variables already take those injuries into account. A trial court may depart from the guidelines range based upon an offense or offender characteristic that was already considered in calculating the range if the court finds that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Claypool*, 470 Mich 715, 720 n 4; 684 NW2d 278 (2004).

³ Defendant also argues that defense counsel provided ineffective assistance because he failed to object to the trial court's story and the prosecutor's remarks during closing argument. However, in light of our above discussion, any objection on those grounds would have been without merit. A failure to make a meritless objection does not constitute ineffective assistance of counsel. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Were we to conclude that the victim's physical injuries were adequately contemplated and scored under the offense variables, a departure from the sentencing guidelines based upon the psychological injuries to the victim was nonetheless warranted as a substantial and compelling reason for departure. MCL 777.34 provides that ten points should be scored for OV 4, psychological injury to a victim, if a victim suffers "serious psychological injury requiring professional treatment." Here, extensive testimony established that the victim suffered severe and long lasting injuries from defendant's abuse. The initial impact of the injuries rendered the victim catatonic, and weeks passed before she spoke about the incident. She was medicated due to severe behavior and anxiety problems, and regularly attends counseling. In addition, the victim suffered from a fear of the bathroom that rendered her unable to use the room for any purpose for a long period of time. She also suffers nightmares and fears darkness. We note that MCL 777.34 uses the term "serious psychological injury" but gives no indication of the degree of seriousness that is required. In light of these far-reaching effects of the abuse, we find that the overall emotional impact that the victim suffered was more egregious and exploitative than that contemplated in OV 4; thus, the trial court did not err in giving further consideration to these injuries.

Defendant also argues that the trial court erred by citing, as a reason for its departure, the numerous bench warrants issued against him. We first note that this reason for departure is not contemplated in the prior record variables or the offense variables used to determine a defendant's minimum sentencing guideline range. Further, a review of defendant's presentence investigation report indicates that defendant had fourteen bench warrants issued over an eleven-year period; thirteen for failure to appear, and one for failing to pay court costs. It is those multiple failures that the court relied on in its departure reasons and it is those multiple failures that evince defendant's disregard for the court's authority. This history establishes a pattern of conduct that is a substantial and compelling reason for the trial court's upward departure from the sentencing guidelines.

If the trial court articulates multiple substantial and compelling reasons to justify a departure from the guidelines, and this Court determines that some of these reasons are substantial and compelling and some are not, the panel must determine the trial court's intentions, specifically whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Babcock, supra* at 260. The trial court stated that, if either reason for departure were stricken, it would nonetheless impose the same sentence. Because the record shows that the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons described above, defendant is not entitled to resentencing.

Affirmed.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette